

A Lame Duck for a Member State? Thoughts on the UK's Position in the EU after the Brexit Vote

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In theory things are pretty straightforward when it comes to the UK's position in the EU after the vote to leave the EU of 23 June. The UK is still a Member State and therefore enjoys all the privileges of EU membership and must fulfil all the obligations that come with it. Importantly, according to Article 4 (2) TEU the Union must treat all Member States equally. After all, Article 50 TEU makes it clear that the Treaties only cease to apply with the entry into force of the withdrawal agreement or after two years from notification if no agreement is reached. The only case in which the departing Member State may be treated differently are discussions and decisions of the European Council and the Council concerning the withdrawal process itself (see Article 50 (4)). The way things have unfolded over the last couple of days seem to show, however, that only in theory there is no difference between practice and theory.

The UK is now a Lame Duck Member State

It is useful, perhaps, to distinguish the period between the leave vote in the referendum before formal notification under Article 50 is given and the period from notification to a UK withdrawal taking effect.

Even though that notification has not yet been given, the European Council met on 29 June without UK participation. Of course, the European Council's lawyers were careful and made sure that this was an 'informal' meeting. This is evidenced by the fact that the European Council's [statement](#) did not feature its letterhead. Nonetheless, it can be found on the European Council's website and the meeting took place using the EU's infrastructure. This is a first piece of evidence that the UK is now a lame duck Member State, still formally part of the club but with one foot out of the door.

A further sign of this came from Jean-Claude Juncker in the European Parliament after the Brexit vote when he [asked](#) Nigel Farage: 'Why are you here?'. Sure, emotions were running high and Nigel Farage was responsible for running a ghastly campaign full of lies and fearmongering. Nonetheless, he still represents people living in the UK in the European Parliament (which incidentally has a veto on a withdrawal agreement) and therefore has a right (and arguably obligation) to be present during the debate. More signs of the UK's second-tier membership status are the fact that the UK's Commissioner Lord Hill, who was in charge of financial services, has resigned and will be presumably replaced by someone who will be given a less important portfolio than their predecessor's.

It was further [reported](#) that UK MEPs stand to lose senior roles, in particular chairmanship of committees. It is envisaged that this happens in January and thus presumably after the UK has formally notified the EU of its intention to withdraw. Nonetheless, this raises the question whether this treatment of the UK is compatible with the equality of Member States. The Aristotelian maxim that 'equals should be treated equally and unequals unequally' comes to mind. And with regard to the meeting of the 27 Member States after the Brexit vote, there are good reasons why they would want to exchange their views without the participation of the state that they would soon have to negotiate an exit agreement with. By contrast, where an unequal treatment of MEPs is concerned, things are more problematic. After all, they represent the Union's citizens (Article 14 TEU) and not the Member States. EU citizens represented by UK MEPs (UK citizens and EU citizens living in the UK) are among those who are likely to be most affected by Brexit. Disadvantaging UK MEPs on the basis of who they represent – whether during this transitional period or not – is anathema to the equality of EU citizens.

It will also be challenging to manage the period after a notification to withdraw. UK MEPs and representatives in the Council still get to vote on legislation, there will be a UK Commissioner and judges in the Court of Justice and General Court. But it is likely that the UK's influence behind the scenes will be diminished. Its bargaining power

in the Council will be reduced and there will be fewer incentives for it to get involved, in particular where legislative measures are likely to enter into force after its departure from the EU.

It will be particularly interesting to see whether the UK will take up the presidency of the Council in the second half of 2017 as planned. While the political role of the Council presidency has become less important since the presidency of the European Council was created by the Treaty of Lisbon, Member States holding the presidency still have a good deal of influence in the determination of the Council's work programme – and thus on the future of the EU's development – during their stint. The UK needs to ask itself how – as a Member State that has indicated its intention to leave the EU – it can credibly set out a plan for the future development of the Union?

EU law loses its bite in the UK

But there are wider questions than these high-flying institutional ones. Within the UK, legal certainty in all matters of EU law might suffer as a consequence of the leave vote. While in theory nothing will change until the day the UK has formally ceased to be a Member State, the following considerations suggest that EU law as applied within the UK may have already lost some of its bite in practice.

One may in particular ask what will happen from now onwards if EU law is not properly applied. Would UK courts show the same commitment to interpreting it faithfully as they did before? Moreover, how receptive will a UK court be to suggestions by parties to a dispute to request a preliminary ruling from the Court of Justice? Given the time involved in drafting the questions plus waiting for an answer from Luxembourg, the UK might be out of the club by the time the case is handed back to the national court. Of course, in most scenarios the answers provided by the CJEU may still be relevant, but would they still be binding? At least from the time Article 50 has been triggered one can therefore expect far fewer preliminary ruling procedures instigated by UK courts, who have not been the most reference-happy courts in the past anyhow.

In addition, how strictly is the European Commission going to fulfil its role as guardian of the Treaties vis-à-vis a departing Member State? Infringement proceedings take a long time, and why should the Commission invest time and energy in proceedings that, in all likelihood, will not be completed before departure? This of course opens up opportunities for public bodies in the UK to tamper with their obligations under EU law, already safe in the knowledge that there may be no sanctions.

Similar concerns apply to private law relationships. Legal uncertainty over the future of the UK's participation in the single market might result in employers being less willing to employ EU citizens and in investors to making commitments in the UK. In addition, if the judiciary becomes laxer in its review of EU law requirements, employers might be incentivised to flaunt them.

These few early thoughts on the current relationship between the UK and the EU show that despite the fact that nothing has technically speaking happened in legal terms, the UK's journey out of the European Union has already commenced and is starting to have tangible legal consequences.

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